

Summary: Self-Defence and Collective Security

Self-defence and collective security represent antagonistic strains of thought on international relations. The right to self-defence, as the remainder of the more encompassing right to self-preservation, reflects the idea of an international order based on the power struggle of states that can ensure survival only by their own strength. Collective security, on the other hand, expresses a belief in the possibility of a peaceful international order and the capability of institutions to bring this order about. Put simplistically, self-defence represents a realist, collective security – an idealist view of international politics (*Introduction*).

I.

Between these two concepts, tension arises almost necessarily, but in the early years of collective security it was still limited. The Council of the League of Nations was weak, and in international conflicts its primary role was to support the victim of aggression. Following classical theories of collective security, the system of peace-maintenance in the League was centred on economic and military sanctions against the aggressor, and because of this very design it could hardly conflict with the victim's own efforts to defend itself. But already during the 1920s the focus of the system of collective security in the League was shifting, with states increasingly recognizing that in some cases peace needed to be secured at the cost of the defending state, for example through the enforcement of cease-fire lines to the disadvantage of the defender. Peace became more important than the security of states, and self-defence began to lose its central, absolute character (*Chapter 1*).

This development culminated in the foundation of the United Nations after World War II. The maintenance of peace then was the predominant concern, and thus the UN Charter defines the purpose of the system of collective security in a much broader way than the Covenant of the League – the Security Council is no longer intended to provide sup

port to the victim of aggression, but to take measures 'to maintain international peace and security'. Moreover, the right to self-defence is embedded in the system of collective security: according to Article 51 of the Charter, its exercise shall not hamper Security Council action, and self-defence must end once the Council has taken the measures necessary to maintain international peace and security. At the San Francisco conference establishing the United Nations, however, the relationship between self-defence and collective security found little attention. Only once a discussion arose on the necessary quality of Security Council measures terminating the right to self-defence, but it ended inconclusively. The precise balance between the intended supremacy of the Council and the 'inherent' character of the right of self-defence, as spelled out explicitly in Article 51, was left open (*Chapter 2*).

State practice, however, has clarified some aspects of this relationship. Not only did the post-war defence alliances recognize the dominant role of the Security Council by repeating the words of the Charter in their foundational documents, but the Council's far-reaching powers were also reaffirmed in a number of conflicts. This was most obvious in cases of binding cease-fire orders, namely in the Falkland/Malvinas conflict, in the war between Iran and Iraq, the war in Bosnia and Herzegovina, and the war between Eritrea and Ethiopia. In all these cases, states accepted that the Security Council, without determining the party responsible for the conflict, could curtail the victim's right to self-defence in order to quickly terminate hostilities, if only both sides credibly declared their readiness to abide by the cease-fire. Implicitly, states thereby also accepted that the Council didn't have to provide for a true substitute for the victim state's defence through collective action, but could instead take weaker measures with the broader goal of restoring peace.

These conclusions are reinforced by state practice in other instances, namely in the Second Gulf War. In the beginning of this conflict, however, the Council had explicitly upheld Kuwait's right to self-defence when it adopted economic sanctions against Iraq, and the initial controversy over whether Kuwait and its allies retained a unilateral right to use force was quite inconclusive. But at a later stage, states accepted the suspension of Kuwait's right to defend itself: after the Council had adopted resolution 678 (1990) authorizing the use of force to repel Iraq, states felt bound not to use force on the basis of self-defence during the grace period stipulated in the resolution. They therefore accepted a subordination of self-defence to collective security, though only to such measures of collective security that promised to be very effective. A different situation arose in the Bosnian war. Already before its out

break, the Security Council had enacted an arms embargo on the territory of the Federal Republic of Yugoslavia which continued to apply after the independence of its former republics. Despite its adverse effects on Bosnia's self-defence, the embargo was initially welcomed by the international community because it served to calm the conflict. Opposition grew only when Bosnia faced the threat of extinction, with some states claiming that the Council lacked the authority to restrict self-defence in such a manner as to endanger the existence of a state. No agreement on this point was reached, however, and the embargo remained in place until the end of the war. But the initial consensus showed that states were willing to accept serious restrictions of the right to self-defence by the Security Council if this enhanced the prospects of a quick termination of the conflict (*Chapter 3*).

II.

The Security Council in its practice thus often prefers the maintenance of peace to the protection of the security of states, and the Charter grants it far-reaching powers to do so. In the Charter, self-defence and collective security are designed to serve diverging purposes: while self-defence protects the security of the individual state, collective security aims at preserving international peace in the much broader sense of the prevention of armed conflict. Thus, in case of a threat to the peace, the Security Council may take coercive measures against any state, regardless of its responsibility for the situation or for the outbreak of a conflict. This decision of the Charter was the object of intense discussions among the founders of the UN who finally recognized that fast action for the preservation of peace might in some cases necessitate the subordination of security interests of the states involved. Article 1(1), in requiring respect for international law only in the settlement of disputes but not in enforcement action, gives expression to this general preference for peace over justice.

Article 51 clarifies that this approach applies also to restrictions of the right of self-defence: by providing that self-defence must cease once the Security Council has taken measures 'to maintain international peace and security', Article 51 refers to the wording of Arts. 39 to 42. The right to self-defence thus ends once the Council performs its general task of peace-maintenance – even if its measures aim at the maintenance or restoration of peace in general but fail to provide for the security of the defending state. Such Council measures might even serve to protect

individuals: collective security, according to the preamble of the Charter, shall save 'succeeding generations from the scourge of war', and since the 1990s, states have increasingly come to accept that the Security Council may take enforcement action to ease human suffering, thereby embodying a notion of human security instead of state security. In sum, Article 51 empowers the Council to subordinate the individual state's right to self-defence to the more general interest of the international community in maintaining peace.

This approach, however, seems to conflict with the very conception of collective security – traditionally, collective security seeks to attain peace through collective measures in support of victims of aggressions, with a view to deterring potential aggressors by the overwhelming strength of the collective system. But the practical feasibility of this classical conception had been drawn into doubt already before the Second World War, and the Charter has chosen a different, partly more modest, partly more ambitious approach. It recognizes that collective action will not come about in all circumstances, but it assumes that once the international community unites its strength, peace will better be secured by fast action than by disputed and time-consuming determinations of the aggressor and by enforcement measures on behalf of the victim. The Charter has thus consciously chosen an approach to collective security which differs from the classical conception (*Chapter 4*).

The resulting subordination of self-defence to collective security is, however, not unlimited. In order to terminate the right to self-defence, Security Council measures must, according to Article 51, be 'necessary' to maintain international peace and security, and the term 'necessary' has commonly (and correctly) been understood as 'effective'. But effectiveness is not to be measured according to the success of collective measures in the protection of the defending state, but according to their effects on the maintenance of international peace and security in the broader sense discussed above. Moreover, state practice shows that the measures need not yet have produced their effects, but that the right to self-defence can be terminated on the basis of a mere prognosis of their effectiveness. And even recommendations and provisional measures can, under certain circumstances, be regarded as sufficiently effective to warrant this result (*Chapter 5*).

The ensuing weakness of the substantive limits on the Security Council's power to restrict self-defence is reinforced by a broad margin of appreciation. The Council enjoys significant discretion in determining whether its measures serve their aims and whether they are sufficiently effective. When the Council expressly states their effectiveness, or im

plies such a judgment through an express termination of the right to self-defence, this decision can be set aside only if it is manifestly ill-founded. This is borne out not only by the wording especially of the latter part of Article 51, but also by state practice: states have asserted the illegality of Council measures only when the lack of effectiveness was, in their view, obvious (*Chapter 6*).

III.

The Charter thus confers on the Security Council very far-reaching powers to restrict the right of self-defence; in principle, it subordinates self-defence to collective security. But the Council enjoys these powers only in the framework of its more general competence to take enforcement action under Chapter VII which is essentially restricted to short-term measures, to the exercise of a 'police function'. Chapter VII action must therefore, in general, confine itself to effects of a provisional nature, and it may not serve to impose the final settlement of a dispute – an issue of particular importance during the negotiations on the Charter. Only because of this limited concept of enforcement action did the Charter allow the Security Council to act regardless of the legal positions of states, and thus regardless of their right to self-defence and their territorial integrity. Consequently, once the Council takes binding measures amounting to long-term dispute settlement (which it has come to do in several instances in the 1990s), it is bound to respect international law – and this applies also when it restricts the right of self-defence in such a manner as to prejudge the outcome of a conflict, as seemed to be the case, for example, in the war in Bosnia.

In reality, however, these distinctions are less clear-cut than the Charter assumes. Preliminary enforcement action and the final settlement of disputes cannot always be neatly separated; oftentimes peace cannot be restored without prejudice to the positions of the fighting parties, especially since an effective mechanism for binding dispute settlement is still missing. Thus, in order to end hostilities, it may be inevitable to take measures with potential long-term effects – measures that, by restricting self-defence, might in the long run cause territorial losses for the state concerned. Since the Charter assumes the neat separation of short-term enforcement action and long-term dispute settlement, it does not provide a legal framework for the cases in between, for those cases in which either peace or justice, but not both, can be attained. Here the Charter leaves a *lacuna* – it does not decide whether the Security Council may

disregard international law and thus restrict self-defence with adverse long-term effects if peace cannot be restored otherwise (*Chapter 8*).

To grant the Security Council such a power would, however, seem to run counter to the very foundations of the international order: the Council could then 'sacrifice' a state, or part of its territory, for the common good of peace, and this enters into conflict with the state-centric character of international law. Thus it has been argued that such a result was barred by *ius cogens*. But state practice does not warrant the qualification of the right of self-defence as a peremptory norm. Too often did the international community welcome treaties restricting self-defence – the ABM treaty is one of the most telling examples. Moreover, *ius cogens* primarily protects interests of the international community as a whole, but not those of individual states, and the right to self-defence falls into the latter category. *Ius cogens* therefore does not grant special status to the right of self-defence. But even if it did, this would not necessarily imply a restriction of the powers of the Security Council because peremptory norms do not constitute limits to the Council's competence, but rather form guidelines for its action (*Chapter 9*).

No different result follows from the 'inherent' character of the right of self-defence, as alluded to in Article 51 of the Charter. If this qualification merely pointed to the existence of self-defence in customary international law, this would not bar a conventional restriction of the right, even a very far-reaching one. And it is doubtful whether 'inherent' means more than that: it is hardly conceivable that it points to a foundation of self-defence in natural law, and even if it were understood as a reference to a general principle of law this would not grant self-defence a special status in the international legal order. Moreover, a closer look at domestic legal systems reveals that self-defence is usually subject to quite far-reaching restrictions. In particular, the principle of necessity allows for the restriction of self-defence if more important interests cannot be safeguarded otherwise. On this basis, encroachments on the territorial integrity of states through the restriction of their right to self-defence might be justified if the integrity of third states or the survival of civilians cannot be assured by other, less intrusive means. This result does not conflict with the sovereignty of states: sovereignty, as a *foundational* concept of international law, is merely formal, allowing each state to decide on the obligations it incurs. But it has no substantive content: states can even give up their existence – and they can also agree on far-reaching restrictions on their right to self-defence. To accept so far-reaching a power of the Security Council seems, however, to allow for politically and morally highly dubious consequences: the Council

could even go so far as to adopt a policy of ‘appeasement’ and sacrifice the integrity of states for the sake of peace and the protection of individuals. As undesirable as this might seem, however, it need not be excluded in every case. Moreover, while concerns of this kind should guide the Security Council in its action, they need not affect the interpretation of its powers from a legal perspective (*Chapter 10*).

These conclusions create still further difficulties when a Security Council measure endangers not only the integrity of a state but also its very existence. Theoretically, though, even in a state-centric system of international law, it is not inconceivable that the Council possesses such a power – states are free to accept so far-reaching a limitation on their sovereignty. And if, in the absence of an express limitation of this kind, one tried to construe a hypothetical treaty of states, the result need not be different. Social contract theories for domestic societies prohibit the sacrifice of individuals only because they presuppose a specific dignity and value of human life which cannot be presupposed for states. The same holds true for restrictions on the principle of necessity in domestic legal systems: insofar as these systems exclude the justification of interferences with the right of life, they rely on the dignity of the individual – a dignity a state does not possess.

However, even if one accepts that in principle the Security Council enjoys the power to jeopardize the existence of a state, it is difficult to conceive of more important interests whose protection might justify such a measure on the grounds of necessity. In a state-centric system, the protection of a greater number of third states could outweigh the existence of one state, but the same might not hold true for the protection of individuals from death and suffering. Sacrificing a state for the sake of individuals seems to be possible only in an international legal order based on individuals or peoples rather than on states. Contemporary international law lends itself to a reconstruction on the basis of peoples, if not individuals, and it is thus not impossible to conclude on a power of the Security Council to even imperil the existence of a state in order to protect the civilian population from the effects of war (*Chapter 11*).

IV.

The UN Charter subordinates self-defence to collective security to a large degree, and general international law indicates that the resulting power of the Security Council to restrict self-defence extends even to

cases where the integrity or existence of the defending state are exposed to significant danger. This reflects the strength that interests of the international community as a whole have gained vis-à-vis interests of individual states in international law: even in an area so central to state sovereignty, international law allows for the prevalence of the common interest in the maintenance of peace and the protection of 'succeeding generations from the scourge of war'. Moreover, this result expresses the degree to which international law has become 'constitutionalized': in the Security Council, the international order possesses a central institution endowed with much wider powers than any state or group of states, resembling more a government than an ordinary organ of an international institution. Finally, insofar as these findings reflect a subordination of the security of states to international peace in a broader sense, they suggest a revision of the foundations of the international legal order. Peace is protected for the sake of humankind, and if it prevails over state security, it would seem more coherent to regard humankind, be it as individuals or as peoples, as the basic unit of international law (*Conclusions*).